IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2738 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KIRTIKUMAR VIRCHANDBHAI KOTHARI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2738 of 2004

MR AMIT M PANCHAL for Petitioner No. 1

MR PR ABICHANDANI, AGP for Respondent No. 1,3

MR MG NAGARKAR for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 04/02/2005

ORAL JUDGEMENT

#. Draft amendment is allowed.

#. In this petition filed under Article 226/227 of the Constitution of India, the petitioner has prayed for appropriate writ, order or direction quashing and setting aside the notices dated 5.6.2003 and 18.9.2003 issued by respondent No.2 - Mahesana Municipality. Further prayer is also made directing the respondents to take similar action against all such properties which are put to use similar to the use made by the petitioner keeping in mind the regulations and provisions of the Gujarat Town Planning and Urban Development Act, 1976 ("the Act" for short).

#. Mr.Amit Panchal, learned advocate appearing for the petitioner, has vehemently submitted that the action of respondent No.2 in initiating the proceedings against the petitioner is discriminatory and violative of Article 14 of the Constitution of India inasmuch as though other persons are having the properties which are put to use similar to the use made by the petitioner, no action has been taken against them and notices are issued only against the petitioner. He further submitted that, not only that but so far as certain other constructions are concerned with regard to some other properties, i.e. Shradhdha Complex, Opp.: Municipal Office, Jasoda Complex, S.T.Workshop Road and Meghrath Complex, Station Road, respondent No.2 Municipality has regularised those construction, and, therefore, requested to see that respondent No.2 Municipality may also give similar treatment to the petitioner. It is further submitted that there are many other illegal constructions in Mahesana town for which no action is taken by respondent No.2, and, therefore, the petitioner should also be given similar treatment which is given to other persons.

#. In response to the notice issued by this Court, Mr.Nagarkar appears for respondent No.2 and Mr.P.R.Abichandani, learned AGP, appears for respondent Nos.1 and 3. Affidavit-in-reply is filed on behalf of respondent No.2 - Mahesana Municipality wherein it is stated that the allegation on the part of the petitioner that no action is being taken against other persons who have put up illegal construction is factually incorrect. It is submitted that notices have already been issued upon those persons and the proceedings are already initiated for the purpose of demolition of illegal construction. It is submitted by Mr.Nagarkar that so far as challenge to the notices dated 5.6.2003 and 18.9.2003 is concerned, the same is not maintainable in view of the fact that these notices came to be challenged by the petitioner by way of Appeal before the Collector,

Mahesnaa under Section 258 of the Gujarat Municipalities Act and the Collector, Mahesana, after giving opportunity to the petitioner, has dismissed the said appeal on merits by order dated 19.1.2004 and held that the construction put up by the petitioner is illegal and contrary to the provisions of the Act and other byelaws and building regulations. It is submitted that the petitioner has not challenged the order passed by the Collector, Mahesana dated 19.1.2004 in Appeal No.12 of 2003 in which the petitioner has challenged the aforesaid two notices. It is further submitted that when the order passed by the Collector, Mahesana, by which, it is found that the construction put up by the petitioner is illegal and contrary to the sanctioned plan / provisions of the Act, byelaws and building regulations and the same is having accepted, it is not open for the petitioner to submit not to demolish the same solely on the ground that no action has been taken against other persons who are similarly situated. It is submitted that, in fact, the notices have already been issued upon the other persons and the proceedings are already initiated and the Municipality will see to it that it will reach to its logical end.

#. Mr.Abichandani, learned AGP, has submitted that in view of the fact that the petitioner has not challenged the legality and validity of the order passed by the Collector, Mahesana dated 12.1.2004, by which, it is held that the petitioner has put up illegal construction contrary to the sanctioned plan / provisions of the Act, byelaws and building regulations, it is not open for the petitioner now to contend not to demolish the same only on the ground that respondent No.2 is not taking action against other persons who are similarly situated. It is submitted that the Collector, Mahesana would look into it and see to it that appropriate action is taken by respondent No.2 against the erring persons.

#. Heard the learned advocates for the parties.

#. It is an admitted position that the petitioner did challenge the notices dated 5.6.2003 and 18.9.2003 before the Collector, Mahesana by way of appeal, being Appeal No.12 of 2003, which came to be dismissed by the Collector, Mahesana by his order dated 19.1.2004. In the said order, after giving opportunity to the petitioner, the Collector, Mahesana has held that construction put up by the petitioner is contrary to the sanctioned plan and/or provisions of the Act and/or byelaws and building regulations. It is also an admitted position that the said order passed by the Collector, Mahesana dated

19.1.2004 came to be challenged by the petitioner before the Deputy Secretary, Urban Development and Urban Housing Department, State of Gujarat, by way of Appeal No.1 of 2004 which also came to be dismissed by order dated 27.2.2004.

#. It is required to be noted that both the aforesaid orders are not challenged by the petitioner and those orders have become final. In view of the aforesaid fact, challenge of the petitioner to the notices dated 5.6.2003 and 18.9.2003 would not survive as very notices were challenged by the petitioner before the aforesaid two authorities and the same came to be dismissed.

#. The contention on the part of the petitioner that the construction put up by the petitioner which is contrary to the provisions of the Act / building regulations and byelaws and also contrary to the sanctioned plan should not be demolished, as, respondent No.2 is not taking any action against other persons who have put up similar type of construction cannot be accepted. Merely because respondent No.2, for some reason, is not taking any action and/or has not taken the action for removing of illegal construction, that does not confer any right in favour of the petitioner to continue with illegal construction. The Honourable Supreme Court has, as such, negatived the contention with regard to negative discrimination in the judgments reported in 2003 (5) SCC 437 and AIR 2000 SC 2389. It is observed by the Honourable Supreme Court that wrong order in favour of one person cannot entitle other person to get the benefit of the same order.

##. Considering the aforesaid two judgments, merely because respondent NO.2 is not taking any action against other persons who have put up illegal construction, the petitioner cannot be permitted to continue with illegal construction. Even the affidavit-in-reply is filed on behalf of respondent No.2 in which it is stated that notices have been issued against all other persons who are similarly situated and who have put up illegal construction. Mr.Nagarkar for respondent No.2 has submitted that respondent No.2 Municipality is very much sincere and serious in taking the action against those persons and the notices which are issued against those persons, they will see to it that it will reach to its logical end. However, respondent NO.3 - Collector, Mahesana is directed to see that appropriate action is taken by respondent No.2 against all those persons who have put up illegal construction, on its own merits and in accordance with law and shall supervise the same. So

far as the allegation made by the petitioner with regard to regularisation of the construction with regard to the aforesaid three buildings, i.e. Shradhdha Complex, Opp.: Municipal Office, Jasoda Complex, S.T.Workshop Road and Meghrath Complex, Station Road, is concerned, respondent No.3 is directed to look into the same and if necessary take the resolution passed by respondent NO.2 regularising construction of those three buildings in review under Section 258 of the Gujarat Municipalities Act and if it is found that the said resolution with regard to regularisation of the construction of those three buildings and/or of any other building is contrary to the provisions of the Act, byelaws and building regulations, respondent NO.3 may take appropriate action against those persons for the purpose of removing illegal construction. It will be open for the petitioner to move appropriate application before respondent No.3 for that purpose also.

##. At this stage, Mr.Amit Panchal has submitted that some time may be given to the petitioner to remove the construction which is found contrary to building byelaws and regulations and provisions of the Act. He submitted that, as such, undertaking is already filed before the Collector to remove the construction voluntarily. He has requested for four weeks time to voluntarily remove illegal construction. In the facts and circumstances of the case, time to remove illegal construction is granted upto 28/2/2005.

##. For the reasons stated above, there is no substance in this petition and the same is dismissed accordingly. Rule is discharged. No costs.

(M.R.Shah,J)

(pathan)